No. 14-1504

In The Supreme Court of the United States

ROBERT J. WITTMAN, *et al.*,

Appellants,

v.

GLORIA PERSONHUBALLAH, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

REPLY OF VIRGINIA STATE BOARD OF ELECTIONS APPELLEES TO SUPPLEMENTAL BRIEFING ON STANDING

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INTRODUCTION

The Virginia State Board of Elections appellees said in their supplemental brief that, although one or more of the Congressmen might be able to demonstrate appellate standing, none had yet articulated an injury in fact sufficient to satisfy Article III. The question here is a close one. But having reviewed Appellants' supplemental brief, we believe that Representative Scott Rigell (R-CD2) has now sufficiently alleged an injury in fact that would be redressed by the relief sought, and, consequently, that he has appellate standing. For the reasons stated in our

previous motion, however, the Court should summarily affirm the judgment of the district court.

ARGUMENT

Representative Rigell has adequately alleged appellate standing, but the Court should summarily affirm.

We disagree with Appellants that *any* marginal change in the partisan vote share of an adjoining district, no matter how small, causes an injury in fact to the adjoining-district officeholder. No precedent supports that argument. It also conflicts with the law in *United States v. Hays* and *Sinkfield v. Kelley*, that even though an adjoining district is "necessarily influenced" by the shape of a racially gerrymandered district, that fact alone does not confer standing on voters in the adjoining district.[1] Those cases likewise bar Appellants' claim of standing based on their status as "Republican voters" in the four districts adjoining CD3.[2]

But we agree with Appellants that *Meese v. Keene*[3] supports Representative Rigell's standing here. *Meese* held that the State senator there had

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[1] *Sinkfield v. Kelley*, 531 U.S. 28, 30-31 (2000) (per curiam); *United States v. Hays*, 515 U.S. 737, 746 (1995).

[2] Appellants' Suppl. Br. at 13.

[3] 481 U.S. 465 (1987).

standing to challenge a federal statute based on his claim that complying with the law, which branded the films he wished to show as "political propaganda," would "substantially harm his chances for reelection."[4] The lower court found that "if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and *his ability to obtain re-election* and to practice his profession would be impaired."[5] The legislator based that claim on an opinion poll and on the affidavit of an expert.[6]

In their supplemental brief, the Congressmen point out that *all* of the "properly filed proposed remedial plans make at least one Republican district represented by an Appellant majority-Democratic."[7] Importantly, of all the parties and non-parties to submit remedial plans, the Congressmen had the greatest incentive to preserve the Republican-voting performance in their own districts. Yet even their own proposed remedial plans would "increase District 2's Democratic vote share from 49.3% to 50.2%."[8] The Congressmen claim (among other things) that even that plan would materially injure Representative Rigell's chances for reelection in that "closely divided

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[4] *Id.* at 474.

[5] *Id.* at 473 (quoting *Keene v. Smith*, 569 F. Supp. 1513, 1515 (E.D. Cal. 1983)) (emphasis added).

[6] *Id.* at 473-74.

[7] Appellants' Suppl. Br. at 6.

[8] *Id.*

district."[9] The Congressmen add that the other plans submitted to date "are equally bad or worse, redrawing at least one Appellant's district—and often several Appellants' districts—into majority-Democratic districts and, in some instances, pairing two or more Appellants in the same district."[10]

The evidence adduced at trial, including testimony about an alternative plan proposed by Plaintiffs, supports Representative Rigell's claim that the remedy in this case may "substantially harm his chances for reelection."[11] Although Plaintiffs have now proposed a different remedial plan, the trial testimony about their original plan is relevant because their new plan would increase the Democratic performance in CD2 nearly as much. The alternative plan they first proposed would have shifted voters from CD3 into CD2, increasing the Democratic vote share in CD2 by more than 5%, as shown in Table 1.

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[9] *Id.* at 2; *see also id.* at 10 ("Plaintiffs' Alternative Plan, which will at least be a starting point for any remedy, harms Appellant Rigell by turning toss-up District 2 into a 'heavily Democratic' district.").

[10] *Id.* at 10.

[11] *Meese*, 481 U.S. at 474.

Table 1

Democratic vote share in CD2 (based on 2008 Presidential Election)[12]	
Enacted Plan	49.5%
Plaintiffs' Alternative Plan (as offered at trial)	54.9%
Plaintiffs' Remedial Plan (currently pending)	54.8%
Congressmen's Remedial Plans	50.2%

The trial testimony established that that plan would materially and adversely affect Representative Rigell's reelection chances. Plaintiffs' own expert, Michael McDonald, testified that CD2 was a "toss-up district" that had "moved back and forth between the parties over the last decade."[13] He agreed that Plaintiffs' alternative plan could make it "more politically difficult" for Rigell to be reelected.[14] He testified that the change could "[p]otentially" have "a very negative effect" on Rigell's "future reelection prospects," though Rigell might "still win in that district because of incumbency advantages and other things."[15] Although

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[12] IX 22; Tr. 303:22-305:10; Intervenor-Defs.' Br. in Supp. of Their Proposed Remedial Plans, Exs. I, S, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (Sept. 18, 2015), ECF Nos. 232-9, 232-19; Appellants' Suppl. Br. at 6.

[13] Tr. 119:10-14.

[14] Tr. 152:8-11.

[15] Tr. 181:17-25.

the majority of the district court rejected the credibility of the Congressmen's expert, John Morgan,[16] Morgan agreed with McDonald's characterization of CD2 as a "toss-up district."[17] He added that a 55%-Democratic-performing district is "highly or safely Democratic," a threshold effectively met by Plaintiffs' alternative plan.[18]

Plaintiffs have now substituted a new remedial plan for the one offered at trial, but as shown in Table 1, their new plan would increase the Democratic performance in CD2 to about the same level, 54.8%, while increasing the Democratic performance in CD4 (Representative Forbes's district) to 52.2%.[19] More importantly, even the Congressmen's proposed remedial plans—plans that are presumptively the *most favorable* to their partisan interests—increase the Democratic performance in Rigell's CD2 from 49.5% to 50.2%, making it a majority-Democratic district.

The standard of substantial-harm-to-reelection chances, set forth in *Meese*, is satisfied here by: (1) the trial testimony that CD2 is a toss-up district; (2) Representative Rigell's claim that he "intend[s] to seek reelection in 2016";[20] and (3) the fact that the remedial plans that are presumptively least

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[16] JS 21a-22a n.16.

[17] Tr. 258:17.

[18] Tr. 304:5-305:7.

[19] Appellants' Suppl. Br. at 6.

[20] *Id.* at 4.

politically injurious to Appellants—the ones they themselves have submitted—nonetheless adversely affect Rigell's reelection chances.[21]

The issue here is a close one. The district court might not alter CD2 in a manner that adversely affects Representative Rigell's reelection chances. And even if the remedial plan increases the Democratic voting performance in CD2, Rigell's incumbency advantage may still enable him to be reelected.[22] But Rigell's claims, tied with the evidence at trial that CD2 is a toss-up district, suffice to show that even the most favorable remedial plan from Appellants' joint perspective nonetheless could have "a seriously adverse effect" on Rigell's chances for reelection.[23] Like the State senator in *Meese*, Rigell "is not merely an undifferentiated bystander with claims indistinguishable from those of the general public."[24] He has alleged a sufficient injury in fact, an injury that would be redressed if he succeeded in his appeal. And "because the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy

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[21] *Id.* at 2, 10.

[22] Rigell won 58.7% of the vote against a Democratic challenger in the 2014 congressional election. *See* Va. Dep't of Elections, 2014 U.S. House General Election, District 2, http://historical.elections.virginia.gov/elections/view/44424/.

[23] *Meese*, 481 U.S. at 473 n.7.

[24] *Id.* at 476.

requirement," the Court need not evaluate the standing of the other Congressmen.[25]

Nonetheless, for the reasons set forth in our previous motion, the Court should summarily affirm. The Congressmen continue to ignore the fundamental tenet of appellate review that the facts must be viewed "in the light most favorable" to Plaintiffs, who prevailed below.[26] The Congressmen insist, as they did unsuccessfully at trial, that the General Assembly intended to enshrine an "8-3 pro-Republican partisan split" when it drew the enacted plan.[27] But they forget that the district court specifically rejected that claim, finding that it was "not supported by the record."[28] Moreover, the district court's finding that CD3 was racially gerrymandered was supported by substantial evidence that the legislature used a 55%-BVAP floor

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[25] *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). We agree with Appellants, however, that to the extent the remedial plan adopted turns one of Appellants' districts into a majority-Democratic district, or forces two Appellants to compete against one another in the same district, those adversely affected Congressmen would have appellate standing under *Meese*, even if the district court left the political composition of CD2 unaltered.

[26] *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 213 (1993).

[27] Appellants' Suppl. Br. at 6; *see also id.* at 4a ("Plaintiffs' plan seeks to override the Legislature's 'inarguabl[e]' political and incumbency-protection goal of maintaining the 8-3 pro-Republican split. . . .").

[28] JS 16a n.12; *see* Mot. to Affirm by Va. State Bd. of Elections Appellees at 30-32.

without regard to whether it was necessary to protect minority voting rights.[29] Given that finding, the court properly concluded that CD3 was unconstitutional under *Alabama Legislative Black Caucus v. Alabama*.[30]

Because the district court's factual findings were not clearly erroneous,[31] the judgment should be summarily affirmed.

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[29] *See* Mot. to Affirm by Va. State Bd. of Elections Appellees at 2-3, 23-29.

[30] 135 S. Ct. 1257 (2015); *see* JS 39a-40a.

[31] *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (discussing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)); Mot. to Affirm by Va. State Bd. of Elections Appellees at 23-24.

CONCLUSION

Representative Rigell has adequately alleged appellate standing, but the Court should summarily affirm the judgment below.

Respectfully submitted,

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